

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Philadelphia, PA, Employer**

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**Docket No. 10-862  
Issued: December 23, 2010**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 17, 2010 appellant, through her attorney, filed a timely appeal from a November 18, 2009 merit decision on the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant was entitled to receive compensation for her permanent impairment at the augmented rate; and (2) whether appellant had more than 12 percent impairment of her right lower extremity and 5 percent impairment of her left lower extremity, for which she has received schedule awards.

On appeal, appellant's attorney contended that there was an unresolved conflict of medical opinion evidence regarding the extent of the permanent impairment of appellant's right and left lower extremities and that she was entitled to receive compensation for her schedule award at the augmented rate.

## **FACTUAL HISTORY**

On January 23, 1989 appellant, then a 45-year-old clerk, fell on her knees when she tripped over loose rubber molding. The Office accepted her claim for right knee sprain on February 16, 1989. Appellant received compensation at the augmented rate based on her marriage. She filed notices of recurrence of disability on June 29, 1989 and June 25, 1995, which the Office accepted as well as the additional condition of chondromalacia patella. Appellant underwent an arthroscopic patellar chondroplasty and partial synovectomy on May 17, 1993. On November 7, 1995 the Office granted her a schedule award for 12 percent impairment of the right leg. It accepted that appellant sustained a recurrence of disability on July 19, 2001. In a letter dated September 7, 2005, the Office accepted patellofemoral syndrome of the left knee.

In a report dated February 3, 2009, Dr. Arthur Becan, an orthopedic surgeon, described appellant's history of injury on January 23, 1989 and the May 17, 1993 surgery. He stated that she had right hip spur.<sup>1</sup> Dr. Becan provided physical findings relating to appellant's right hip and right and left knees. He found a mild effusion of the right knee with peripatellar tenderness as well as tenderness along the medial and lateral patellar facet. Appellant had pain in patellofemoral compression and tenderness over the medial joint line. Dr. Becan found extension of 120 degrees. In regard to appellant's left knee, he found moderate effusion with paripatellar, medial and lateral patellar tenderness as well as tenderness over the medial and lateral joint lines. Appellant demonstrated extension of 110 degrees. Dr. Becan found loss of muscle strength in both quadriceps. He applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>2</sup> (A.M.A., *Guides*) to find that she had 25 percent impairment due to loss of range of motion of the right hip<sup>3</sup> as well as 3 percent pain-related impairment<sup>4</sup> or a total 28 percent impairment of the right lower extremity. Dr. Becan found that appellant had motor strength deficit in the left quadriceps of 12 percent,<sup>5</sup> 3 percent impairment due to pain-related impairment<sup>6</sup> or total left lower extremity impairment of 15 percent. He concluded that she reached maximum medical improvement (MMI) on February 3, 2009.

In a letter dated March 23, 2009, appellant's attorney requested schedule awards based an additional 16 percent impairment of the right lower extremity and 15 percent impairment of the left lower extremity.

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<sup>1</sup> The Office also accepted right hip osteoarthritis and found 15 percent impairment of her right lower extremity due to this accepted condition in a separate claim. The district medical adviser did not address appellant's right knee condition in formulating his impairment rating of the right lower extremity on April 2, 2009.

<sup>2</sup> A.M.A., *Guides*, 5<sup>th</sup> ed. (2001).

<sup>3</sup> *Id.* at 537, Table 17-9.

<sup>4</sup> *Id.* at 574, Figure 18-1.

<sup>5</sup> *Id.* at 532, Table 17-8.

<sup>6</sup> *Supra* note 4.

The Office referred the record to an Office medical adviser on April 13, 2009. In a report dated April 14, 2009, Dr. Morley Slutsky, a Board-certified orthopedic surgeon, noted that appellant's diagnosed condition was bilateral knee chondromalacia patella and that she met the criteria for rating her knees for patellofemoral pain in accordance with Table 17-31 of the A.M.A., *Guides*.<sup>7</sup> He stated that there was no conclusive evidence of ratable patellofemoral arthritis in either knee based on x-ray, but referenced the footnote accompanying Table 17-31 which states, "[In an individual with] a history of direct trauma, a complaint of patellofemoral pain and crepitation on physical examination but without joint space narrowing on x-rays, a ... five percent lower extremity impairment is given." Dr. Slutsky noted that this rating included pain so that any additional rating for pain would be duplicative.<sup>8</sup> He stated that appellant had impairment to both knees of five percent. Dr. Slutsky reviewed her quadriceps strength findings and opined that her significant patellofemoral pain would produce nonvalid strength measurements. He stated that section 17.2e<sup>9</sup> of the A.M.A., *Guides* established that individuals inhibited by pain or fear of pain were not good candidates for manual muscle testing. Dr. Slutsky specifically excluded appellant's right hip from his impairment evaluation.

By decision dated April 24, 2009, the Office granted appellant a schedule award for five percent impairment of the left lower extremity. It calculated her compensation based on the basic rate of 66 2/3 percent on the grounds that there was insufficient evidence of eligible dependents.

On April 9, 2009 appellant requested a schedule award and listed her spouse as a dependant. She indicated that her husband lived with her.

Appellant, through her attorney, requested an oral hearing on May 1, 2009 held on August 20, 2009. Counsel noted that the right leg was not in question. Appellant testified that she had been married for 45 years and that her husband lived in a healthcare facility since November 2008 due to a head injury, pneumonia and sepsis. She stated that there was no divorce contemplated, that her husband was allowed to come home on the weekends and Wednesdays. The hearing representative stated that she would ensure that the compensation was changed to the augmented rate. Appellant stated that she continued to perform light-duty work. Her attorney contended that Dr. Slutsky improperly utilized the diagnostic method rather than the approach used by Dr. Becan and that more recent x-rays were necessary to determine appellant's permanent impairment based on arthritis. Following the oral hearing, appellant resubmitted Dr. Becan's February 3, 2009 report applying the sixth edition of the A.M.A., *Guides* to her physical findings.

By decision dated November 18, 2009, the hearing representative affirmed the November 18, 2009 decision. While she discussed appellant's marriage and her husband's illness, the hearing representative did not make a finding on the appropriate compensation rate for appellant's schedule award. The hearing representative noted that Dr. Slutsky discussed the

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<sup>7</sup> *Id.* at 544, Table 17-31.

<sup>8</sup> *Id.* at 526, Table 17-2.

<sup>9</sup> *Id.* at 531, section 17.2e.

findings of Dr. Becan's February 2009 report and offered reasoning for discounting this method of calculating impairment and found that this report was entitled to the weight of the medical opinion evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>10</sup>

In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, the Office is required by its statute and regulations to make findings of fact. Section 8124(a) of the Act provides: "The [Office] shall determine and make a finding of fact and make an award for or against payment of compensation...."<sup>11</sup> Section 10.126 of Title 20 of the Code of Federal Regulations provides: "The decision shall contain findings of fact and a statement of reasons."<sup>12</sup>

The Office's procedure manual specifies additional requirements for a final Office decision denying a claim for benefits. In the subsection titled, "Discussion of Evidence" the procedure manual states: "[T]he [Office] should identify and discuss all evidence which bears on the issue at hand ... [and] should summarize the relevant facts and medical opinions...." In the subsection titled, "Basis for Decision" the procedure manual states: "The reasoning behind the [Office's] evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it."<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

In the April 24, 2009 decision, the Office based appellant's schedule award on the statutory 66 2/3 rate because it found insufficient evidence of dependents. Following this decision, appellant submitted a claim for compensation and listed her husband as a dependent, providing his date of birth and social security number. At the oral hearing she testified that she had been married for 45 years. Appellant was still married but did not reside with her husband, who was currently residing at a convalescence home to recover from serious injuries sustained in November 2008.

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<sup>10</sup> *Avalon C. Bailey*, 56 ECAB 223 (2004).

<sup>11</sup> 5 U.S.C. § 8124(a).

<sup>12</sup> 20 C.F.R. § 10.126.

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4e and 5a(2)(b) (March 1997).

In the November 18, 2009 decision, the hearing representative summarized appellant's testimony regarding her marital state and her assertion that her husband continued to be a dependent. However, she did not make any factual findings regarding this testimony, did not provide any discussion of the relevance of this testimony or address why she concluded that the Office's April 24, 2009 decision should be affirmed in regard to appellant's compensation rate.

On appeal, appellant's attorney argued that appellant is entitled to compensation at the augmented rate. The Board finds that the hearing representative's decision did not include the necessary findings of fact or provide the required statement of reasons in regard to the issue of rate of compensation. Appellant has no basis for interpreting the hearing representative's decision to limit her compensation to the basic rate and no guidance to help her to present further evidence in her quest to establish that her husband is a dependent and she is entitled to compensation at the augmented rate. Due to these deficiencies the Board finds that this issue is not in posture for a decision and will be remanded to the Office for further development and an appropriate decision.<sup>14</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The schedule award provision of the Act<sup>15</sup> and its implementing regulations<sup>16</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. Effective February 1, 2001,<sup>17</sup> it adopted the fifth edition of the A.M.A., *Guides* as for evaluating schedule losses and the Board has concurred in such adoption.<sup>18</sup>

In evaluating lower extremity impairments, Chapter 17 of the A.M.A., *Guides* notes that alternative methods exist by which impairment may be assessed: anatomic, functional or diagnosis-based estimates.<sup>19</sup> The evaluator is directed to the cross-usage chart at Table 17-2 on

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<sup>14</sup> *Avalon C. Bailey, supra* note 10.

<sup>15</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>16</sup> 20 C.F.R. § 10.404.

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (August 2002).

<sup>18</sup> For new decisions issued after May 1, 2009 the Office began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6<sup>th</sup> ed., 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>19</sup> A.M.A., *Guides* 525.

page 526 to determine when the methods for evaluating impairment may be combined. The Office's procedure manual also provides, "Before finalizing any physical impairment calculation that requires the combination of evaluation factors, the [Office medical adviser] should verify the appropriateness of the combination in Table 17-2."<sup>20</sup>

In determining which evaluation method to follow, the A.M.A., *Guides* provide the following instruction:

"The evaluator's first step is to establish the diagnosis(es) and whether or not the individual has reached MMI. The next step is to identify each part of the lower extremity that might possibly warrant an impairment rating (pelvis, hip, thigh, etc., down to the toes). Figure 17-10 lists potential methods for each lower extremity part. The evaluator determines whether ROM [range of motion] impairment or other regional impairments are present for each relevant part and records the impairment values in the appropriate locations on the worksheet. The selection of the most specific method(s) and the appropriate combination are later considerations.

"After all potentially impairment conditions have been identified and the correct ratings recorded, the evaluator should select the clinically most appropriate (*i.e.*, most specific) method(s) and record the estimated impairment for each. The cross-usage chart (Table 17-2) indicates which methods and resulting impairment ratings may be combined. It is the responsibility of the evaluating physician to explain why a particular method(s) to assign the impairment rating was chosen. When uncertain about which method to choose, the evaluator should calculate the impairment using different alternatives and choose the method or combination of methods that gives the most clinically accurate impairment rating."<sup>21</sup>

It is well established that preexisting impairments to the scheduled member are to be included when determining entitlement to a schedule award.<sup>22</sup> Office procedures state that any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.<sup>23</sup>

### **ANALYSIS -- ISSUE 2**

The record establishes that appellant received a schedule award on November 7, 1995 for 12 percent impairment of her right lower extremity due to her accepted right knee condition. She also received an additional schedule award for 15 percent impairment of her right leg due to a hip condition accepted in a separate claim. The medical evidence consists of a February 3, 2009

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<sup>20</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

<sup>21</sup> A.M.A., *Guides* 525-26.

<sup>22</sup> *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

<sup>23</sup> Federal (FECA) Procedure Manual, *supra* note 17 at Chapter 2.808.7a(2) (November 1998).

report, from Dr. Becan who described appellant's injuries on January 23, 1989 and the May 17, 1993 surgery. He also discussed her right hip condition and provided impairment ratings. On physical examination, appellant's right knee demonstrated a mild effusion and tenderness. She expressed pain during patellofemoral compression and limited range of motion with extension of 120 degrees. Appellant's left knee findings included moderate effusion with tenderness and 110 degrees of extension. Dr. Becan determined that she had loss of muscle strength in both quadriceps. Upon applying the appropriate edition of the A.M.A., *Guides* he found 28 percent impairment of the right lower extremity due to permanent changes in the right hip. Dr. Becan did not include any impairment rating of the right knee in his calculations. In regard to appellant's left knee, he found that she had 12 percent impairment due to motor strength deficit of the left quadriceps<sup>24</sup> and 3 percent impairment due to pain-related impairment<sup>25</sup> for total left lower extremity impairment of 15 percent. Dr. Becan concluded that she reached MMI on February 3, 2009.

This report does not address appellant's right knee impairment for schedule award purposes, instead focusing on the impairment of her right hip, which was not accepted under this claim. Dr. Becan found that she had impairment of the left knee due to motor strength deficits and pain in accordance with Chapter 18 of the A.M.A., *Guides*. The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.<sup>26</sup> Dr. Becan did not provide any explanation for why he believed that the best method to assess appellant's pain was through the provisions of Chapter 18 of the A.M.A., *Guides*. Lacking and discussion, the Board finds that this assessment was not appropriate.

Dr. Slutsky, the Office medical adviser, reviewed the medical records on April 14, 2009. Based on the diagnosed condition of bilateral knee chondromalacia patella, appellant's impairment was rated through the footnote to Table 17-31 of the A.M.A., *Guides*.<sup>27</sup> As noted, this footnote states, "[In an individual with] a history of direct trauma, a complaint of patellofemoral pain and crepitation on physical examination but without joint space narrowing on x-rays, a ... five percent lower extremity impairment is given." Dr. Slutsky noted that this rating included pain, so that any additional rating for pain would be duplicative. He found five percent impairment to both knees. Dr. Slutsky opined that appellant's patellofemoral pain would result in invalid strength measurements referencing section 17.2e<sup>28</sup> of the A.M.A., *Guides*. This

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<sup>24</sup> *Supra* note 5.

<sup>25</sup> *Supra* note 4.

<sup>26</sup> *Supra* note 20; A.M.A., *Guides* at 18.3(b); *see also* Philip Norulak, 55 ECAB 690 (2004).

<sup>27</sup> *Supra* note 7.

<sup>28</sup> *Supra* note 9.

provision states that manual muscle testing depends on the examinee's cooperation and that individuals whose performance is inhibited by pain or the fear of pain are not good candidates of manual muscle testing and other evaluation methods should be considered. Dr. Slutsky also declined to consider appellant's right hip condition in formulating her permanent impairment on the grounds that this was not an accepted condition.

The Board finds that appellant has not established more than five percent impairment of her lower extremities. As found by Dr. Slutsky the A.M.A., *Guides* limit the value of manual muscle testing when the claimant's have a painful condition. Appellant has asserted that her knees are painful and thus supported the conclusion that manual muscle testing is not a valid method of evaluating her impairment. Dr. Slutsky applied an appropriate provision of the A.M.A., *Guides* to evaluate her permanent impairment based on the medical evidence in the record. As there is no other medical evidence comporting with the standards of the A.M.A., *Guides*, the Office properly found that appellant had no more than five percent impairment.

On appeal, appellant's attorney alleged that there was an unresolved conflict of medical opinion evidence. The Board finds that Dr. Becan's report does not fully comport with the protocols of the A.M.A., *Guides*. Dr. Slutsky's opinion is entitled to the weight of the medical evidence. It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.<sup>29</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding the issue of appellant's entitlement to augmented compensation and that she has no more than five percent impairment of each of her lower extremities due to her January 23, 1989 employment injury.

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<sup>29</sup> Linda Beale, 57 ECAB 429 (2006).



**ORDER**

**IT IS HEREBY ORDERED THAT** the November 18, 2009 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside and remanded in part for a decision consistent with this decision of the Board.

Issued: December 23, 2010  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board